Supreme Court, U.S.
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No. 93-259

In The

Supreme Court of the United States

October Term, 1993

MONROE COUNTY, FLORIDA,

Petitioner,

v.

NEW PORT LARGO, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I

MAY THE STATUTE OF LIMITATIONS ON A FEDERAL CLAIM FOR JUST COMPENSATION BASED ON A ZONING DECISION BE TOLLED WHILE A PROPERTY OWNER PURSUES STATE COURT CHALLENGES TO THE VALIDITY OF THE ZONING DECISION?

II

ARE THERE ANY REASONS FOR THIS COURT TO EXERCISE ITS DISCRETION TO REVIEW A CASE WHICH IS NOT IN CONFLICT WITH THE LAW OF ANY OTHER CIRCUIT OR OF THIS COURT WHEN THERE ARE MULTIPLE REASONS WHY RESPONDENT'S CLAIM WAS TIMELY BROUGHT?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Respondent, NEW PORT LARGO, INC. ("NPL"), hereby responds to the Petition for Certiorari filed by MONROE COUNTY as follows:

The facts as stated by Petitioner are misleading in the extreme. The County's factual description departs from chronological order and omits many pertinent events. Thus, NPL feels constrained to briefly recite the pertinent facts.

Purchase. On September 1, 1979, NPL bought the property at issue (9.65 acres fronting on the Atlantic Ocean) as part of a purchase for $3.2 million and other consideration. NPL, relying on the residential zoning in place, intended to develop the lots for sale as homesites. As of that time, the property had been platted into residential lots; the County had required that subdivision improvements be done for residential development and had for years collected taxes and levied solid waste assessments on the property as residential lots. (Appendix 1).[1] The prior owner had indeed allowed the road on the property to be used as an airstrip as a temporary measure pending eventual residential development. A lease for that purpose would (and did) expire in 1982. (R1-1; R12-243; R13-253).

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[1] Appendix 1 contains the factual findings in a Florida state court judgment in an action between these parties which was later affirmed on appeal. See discussion of "title lawsuit," infra.

Rezoning. On January 24, 1980, the property was rezoned to "private airport" by Monroe County's Zoning Board on application of the County itself. NPL unsuccessfully appealed the rezoning to the Monroe County Commissioners on September 11, 1980. The County's stated bases for the action were that the County needed the airport for its citizens and that the County was in fact entitled to actual ownership of the property because of certain allegedly broken promises to the County by the original owner of the subject property in the 1960's. The County intended that the airport continue to be used as a *public* airport. The zoning, however, required use for a *private* airport, which under Florida law, Fla.Stat. 330.27 (10), (11), (see also Petitioner's Appendix E to Writ for Cert. at E-1) was an airport usable only by the airport operator and its guests. A "public airport," by contrast, is "open for use by the public." Fla.Stat. 330.27(11) (1979). As a Florida state court would find in the state court zoning challenge:

> The airport located on the subject property operated by the lessee was a public airport. (App. 1).

Florida law has contained procedures, in place since 1945, for the acquisition of land by municipalities for airport purposes. Fla.Stat. 330.01-330.12 (1979). Florida law provides that airport property "may be acquired by purchase, gift, devise, lease or other means if such municipality is able to agree with the owners of such property on the terms of such acquisition, and otherwise by condemnation in the manner provided by [law]." Fla.Stat. 332.01(2). Rezoning to airport without the owner's agreement is, not surprisingly, not an option contemplated by

Florida law. The County, nonetheless, chose this expedient.

Start of Litigation. Following the County's rezoning, in October 1980 NPL filed a challenge to the rezoning in state law certiorari proceedings, claiming that the rezoning was a departure from the essential requirements of law. The County's defense to NPL's zoning challenge was essentially to file a separate action, the title lawsuit, against NPL claiming that in fact title to the property in question belonged to the County itself as beneficiary of a constructive trust. After four years, this title lawsuit was ended in NPL's favor with the County's arguments of fraud wholly discredited. See state court Judgment, Appendix 1, *aff'd., Monroe County v. New Port Largo,* 467 So.2d 757 (Fla. App. 1985). In addition to NPL's zoning challenge and the County's title lawsuit, the County filed an unjust enrichment lawsuit against NPL, which was eventually dismissed with prejudice, (R11-215) and cooperated against NPL's airport tenant in eviction and bankruptcy proceedings involving that tenant. (R1-1 99; R9-184; R15-290) All this litigation collectively lasted from 1980 through 1986. (R1-1).

"Sale" or Transfers of Property in 1982. The County's petition is pervaded by its false and misleading assertion that New Port Largo "sold" the property at issue on September 9, 1982. The undisputed facts are quite different than the County's argument suggests. New Port Largo was beneficially owned in equal shares by two individuals, Mr. Netter and Mr. Marr. In 1982, in the midst of bitter litigation against the County, Mr. Netter and Mr. Marr transferred half of the lots into a corporation owned by Mr. Netter and half into a trust for the

benefit of Mr. Marr. This is stated in an *uncontradicted* affidavit (Appendix 3; R12-243). It is *undisputed* that "the beneficial owners of New Port Largo, Stuart Marr and [Charles Netter] remained such and in the same proportion [50-50] after the 1982 transfers." *Id.* Thus, there was no change in the substance of ownership between 1979 and the ultimate invalidation of the zoning as confiscatory in 1986. In no sense did the owners of the property at issue "divest" themselves of it as the County alleges.

Zoning Challenge Successful in State Court. Once the title lawsuit was resolved, New Port Largo pressed its state-law zoning challenge to a conclusion. Despite the title transfers, NPL remained the party plaintiff in this action, which was proper under the Florida substitution of parties rule, Fla.Rul.Civ.P. 1.270(c), which is similar to, and even more permissive than, Fed.R.Civ.P. 21(c).

New Port Largo argued, among other challenges, that the taking was invalid under state law and a taking under federal law. The state court invalidated the zoning, holding, inter alia, that "the subject property did not qualify by dimensions to meet the requirements as a public airport or a private airport" and that "rezoning of this property, now determined [in the title lawsuit] to be private, to airport, would deprive the owner of any reasonable use." (Final Judgment, App. 2).[2] Accordingly, pursuant to Florida law, e.g., *Kasser v. Dade County*, 344

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[2] Appendix 2 contains the Final Judgment in NPL's zoning challenge.

So.2d 928, 929 (Fla. App. 1977); *see, Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987) (describing certiorari remedy under Florida law for confiscatory zoning), the rezoning was invalidated. The County has never appealed this judgment nor moved to collaterally attack this judgment on any ground. NPL did not appeal, of course, since it obtained the declaratory relief it had requested, the only relief then available under Florida law.

Initiation of Federal Lawsuit. NPL filed the instant lawsuit in July 1987 seeking, among other things, just compensation for the temporary taking of its property. The County's immediate response was to move that the action should be dismissed as barred by the four-year statute of limitations. The district court, in a reported decision, denied the motion on the ground that the County's alleged actions, including the title lawsuit, represented a "continuing wrong" against plaintiff which tolled the running of the section 1983 statute of limitations. *New Port Largo v. Monroe County*, 706 F.Supp. 1507 (S.D. Fla. 1986). The County did not in any way question this ruling on appeal of the Final Judgment to the Eleventh Circuit. It is thus the law of this case that (assuming a unity of ownership) the continuing wrongs alleged by the County were sufficient to toll the statute of limitations until the conclusion of the title litigation in 1985.

Monroe County later moved for summary judgment on the argument that, solely because of the 1982 transfers, NPL did not suffer any "continuing wrong" after 1982. Monroe County cited no authority to suggest that a

change in the form of ownership among the same beneficial owners would affect the liability of a state governmental agency for a "taking." Nor did the County explain why NPL's defense of the title lawsuit in which it was the defendant and NPL's pursuit of the eviction and other litigation did not serve as a "continuing wrong" to NPL past 1982. Moreover, the transferee title owners executed an Assignment and ratification to confirm that NPL was the proper plaintiff, able to pursue all of their claims as well as its own. Appendix 3. This Assignment and ratification agreement related back to the initial filing of the Complaint in 1987, pursuant to Fed.R.Civ.P. 17. Nonetheless, the district court, without citation of any case authority, granted Monroe County's motion for summary judgment on the limitations ground.

Reversal on Appeal. On appeal of this dismissal, reported at 985 F.2d 1488 (11th Cir. 1993), the Eleventh Circuit reversed based upon an intervening precedent, *Corn (III) v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir. 1990). The Court held that NPL's pursuit of the zoning challenge tolled the running of the section 1983 statute of limitations. The Eleventh Circuit did not reach other bases for reversal raised by appellant. Like the existence *vel non* of a taking, the Eleventh Circuit left the effect, if any, of the 1982 transfers as an issue for the district court on remand. *New Port Largo v. Monroe County*, 985 F.2d at 1490 n.2. After the Eleventh Circuit's denial of Petitioner's motions for rehearing and rehearing in banc, without seeking a response from NPL, Petitioner filed the instant petition for certiorari.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because the decision rendered by the United States Court of Appeals for the Eleventh Circuit does not conflict with any decision of this Court or of another United States Court of Appeals on the same matter and because there are no special and important reasons for this Court to review the above-entitled case.

Like every court of appeals which has addressed the question, the Eleventh Circuit has ruled that a landowner's pursuit of state law challenges to land use regulation may toll the accrual of the statute of limitations for an inverse condemnation or "just compensation" claim. The Eleventh, Sixth and Ninth Circuits are in accord with this holding, and no court of appeals has ruled to the contrary. Moreover, the policy considerations served by this rule of law – namely, encouragement of local land use law disputes to be resolved in state court – fully support it. There is no special importance to this case, or compelling argument raised by Petitioner, sufficient for the court to address an issue on which the courts of appeals are in accord.

Moreover, there are other legal hurdles to the Petitioner's ultimate success on the statute of limitations issue even if its challenge to the decision of the Eleventh Circuit is upheld. Respondent's claim would still be timely because (1) the continuing wrongs of Monroe County, as previously held by the district court, prevented accrual of the statute of limitations; (2) equitable tolling principles of Florida law tolled the statute of limitation; (3) a federal district court would have been

compelled to abstain in any lawsuit brought before resolution of all original state court litigation; and (4) NPL's direct claims for compensation under the Constitution would be timely under the borrowed limitation period for Florida real property actions.

Based on the above, the Petition for Writ of Certiorari should be denied.

ARGUMENT
REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS IS FULLY CONSISTENT WITH THIS COURT'S DECISIONS AND THOSE OF OTHER CIRCUITS

The gist of Petitioner's argument is that the holding of the court below is inconsistent with this Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). In fact, as the majority below noted, no such inconsistency exists. The *Williamson* opinion states that exhaustion of state review procedures of, for instance, zoning actions, is not required before a section 1983 action for inverse condemnation *may* be commenced. *Williamson*, 473 U.S. at 192, 194 n.13. The court below held that where an aggrieved property owner challenges a rezoning in state court, this may extend the period of time in which an otherwise ripe claim may properly be pursued by tolling the applicable statute of limitations.

While another Eleventh Circuit case, *Corn v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir. 1990) (styled *Corn III* by the Eleventh Circuit in the instant matter), may arguably have conflated the two separate questions of ripeness and tolling, it is clear after the *New Port Largo* case that the only issue on which the Eleventh Circuit has actually ruled is in the latter. The Court held that "NPL's temporary regulatory taking claims were tolled until January 2, 1986, when the state circuit court invalidated the County's rezoning of the subject property." After *New Port Largo*, the law in the Eleventh Circuit and elsewhere is that while a landowner may (assuming the other prerequisites are met) begin a section 1983 action without challenging a rezoning in state court, if the landowner does institute such a state court challenge, the federal statute of limitations on the closely related federal constitutional claims may be tolled.

In this, the Eleventh Circuit is in accordance with each and every other circuit that has addressed the question. As correctly pointed out in the concurring opinion of Circuit Judge Edmondson, no case of this Court is in conflict. The Ninth Circuit, of course, in *Norco Construction, Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986) (Kennedy, J.), on facts parallel to *Corn III* and *New Port Largo*, reached the same conclusion. The Sixth Circuit, in *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1987), has also reached a result consistent with the tolling allowed in the Ninth and Eleventh Circuits. The Seventh Circuit, while it has apparently not addressed the exact question at issue here, has cited *Norco* and *Corn III* with approval in the very case which Petitioner claims represents a "conflict." *Biddison v. City of Chicago*, 921 F.2d 724, 727

(7th Cir.), *cert. denied*, 112 S. Ct. 192 (1991). The other cases cited by Petitioner, *Gilbert v. City of Cambridge*, 932 F.2d 51 (1st Cir. 1991) and *Landmark Land Company v. Buchanan*, 874 F.2d 717 (10th Cir. 1989) simply cite *Williamson* without addressing tolling issues or making any criticism whatsoever of either the *Norco* or *Corn III* decisions. In fact, *no* circuit court case has ever made any criticism whatsoever, or identified any conflict, with the rule of law as adopted by the Eleventh Circuit. There is simply no "conflict among the circuits" for this Court to resolve.

Nor is there as a matter of public policy any reason for concern regarding the result reached by the Eleventh and Ninth Circuits and others which have cited *Norco* or *Corn III* with approval. As Circuit Judge Edmondson stated in his concurring opinion:

> As a practical matter, we also want, in taking cases based on local land use regulation, no rule that makes landowners feel that it is risky to use the state courts to do a task for which the state courts are extremely well suited: to determine the validity or invalidity of the land use regulation. The landowners who go into court are neither sleeping on their rights nor lulling local governments into thinking there is no problem. If landowners suspect that the statute of limitations may run on their federal compensation claims while they are in state courts, they might either always ignore the state courts and come directly to federal court, or file in both state and federal court at the outset. Either way, we add to the workload of the federal courts needlessly and probably increase the likelihood that federal

> courts will be interfering in local land use determinations.

Id., 985 F.2d at 1502 (Edmondson, J., specially concurring.) The Petitioner has said nothing to take issue with the wisdom of Judge Edmondson's analysis. The Eleventh Circuit's ruling, like this Court's *Williamson* case, is calculated to encourage the pursuit of land use regulation challenges in state court, a salubrious result by any standard.

The County, in its Point II, attempts to argue that this case might give this Court some basis for addressing hypothetical and fanciful problems not raised by the facts of this case which the County believes may arise when a landowner has sold property before a "final development decision." It strains credulity more than a bit for Monroe County to complain of the plight of landowners who find it difficult to pursue their "legitimate claims for just compensation." Petition at 11. The facts of this case do not in any event raise the issues discussed by Monroe County in its Part II. The holding of the Eleventh Circuit, as stated by that Court, is simply that "NPL's temporary regulatory taking claims were tolled until January 2, 1986, when the state circuit court invalidated the County's rezoning of the subject property." *Id.*, 985 F.2d at 1495. The case is thus a limitations tolling decision; the court did not rule on the issue of whether the action could have been brought earlier. See *Id.*, 985 F.2d at 1499 (Edmondson, J., concurring). The law regarding when a claim may first be pursued (i.e., ripeness) remains as stated in this Court's decision in *Williamson*.

The County asserts that "fact patterns involving the sale of property" will become more frequently raised in

taking actions. Petition at 11. If so, then surely this is an argument for treating such issues when they arise in their factual context, rather than hypothetically. They do not arise in this case, where it is uncontradicted that in reality the only "sale" that occurred was a change in the form of ownership between the same beneficial owners, who remained 50-50 partners in the subject property from 1979 through 1986. Appendix 3. Such a transfer cannot, contrary to the County's argument, generate a ripe cause of action where one would otherwise be lacking. Surely, a landowner could not evade the *Williamson* finality requirements by transferring his property to a corporation he himself controlled. Yet this bizarre and facially absurd position is what the County would have this court address. Based on the policies of the just compensation clause, there is no reason to give such transfers as occurred here any significance for taking liability or statute of limitation purposes. Nor would the principles of law that might be relevant to a case of true relinquishment of ownership be informed by a consideration of the facts of this case.

The facts of this case, while crying out in Respondent's mind for a federal damages remedy, are atypical. As recognized by the Eleventh Circuit below, 985 F.2d at 1493-94, Florida law at the time of NPL's challenge expressly did not allow damages for confiscatory zoning. *E.g., Kasser v. Dade County, Florida*, 344 So.2d 928 (Fla.App. 1977) (inverse condemnation cause of action based on zoning did not exist; sole remedy under Florida law is invalidating of zoning as

confiscatory);[3] *Corn v. City of Lauderdale Lakes (Corn I)*, 816 F.2d 1514, 1517-19 (11th Cir. 1987) (same). With the later decisions of *First English Evangelical Lutheran Church v. City of Los Angeles*, 482 U.S. 304 (1987) (damages claim for temporary taking exists), and *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), (no federal claim until state fails to provide just compensation), it is likely that most, if not all, states will allow or require damage claims (i.e., "just compensation" claims) to be pursued in state court. While it is not impossible to imagine valid federal inverse condemnation claims, the barriers and delays endured by NPL in this case are not likely to be often repeated.

II

THE JUDGMENT WAS CLEARLY CORRECT FOR ADDITIONAL REASONS

The Eleventh Circuit's opinion resolved the case before it in terms of the tolling effect of the state court zoning challenge which NPL endured from 1980 to 1986. The Eleventh Circuit decision that the section 1983 statute of limitations was tolled during the pendency of the zoning challenge was clearly correct.

Because this ground alone made clear that reversal was required, the court did not choose to reach other equally persuasive bases for reversal. These grounds,

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[3] *Kasser*, from the district court of appeal with appellate jurisdiction over Monroe County, would have been the governing precedent in the minds of NPL's attorneys at the time of the state court zoning challenge.

however, would defeat Petitioner's statute of limitations defense even absent the *Corn III* reasoning.

Foremost among these is the "continuing wrong" tolling argument, which was initially argued by plaintiff, and accepted by the district court, and was in proceedings below utilized by Monroe County as well. *See, NPL v. Monroe County*, 985 F.2d at 1492-93. All parties acknowledge that, assuming NPL held continued ownership of the property, the statute of limitations would be tolled at least through mid-1985 (the conclusion of the title litigation) on the "continuing wrong" theory. Much as the statute of limitations for a claim of conspiracy or discrimination does not accrue while wrongful acts pursuant to the conspiracy or discriminatory practice are ongoing, *Gibson v. United States*, 781 F.2d 1334, 1340-41 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987) (Section 1983 conspiracy); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982) (discriminatory practices), the statute of limitations on an inverse condemnation claim does not accrue in the face of new affirmative acts of appropriation. The acts of the County which served as "continuing wrongs" or continuing acts of appropriation, include (1) the title lawsuit filed by Monroe County against NPL in state court arguing that the County was entitled without any payment whatsoever to the 9.65 waterfront acres at issue; (2) still another lawsuit against NPL filed by Monroe County in which it claimed that NPL's purchase and possession of the property represented "unjust enrichment"; (3) aiding and abetting (by testimony and otherwise) the efforts of the airport tenant to resist NPL's eviction of him following the termination of his lease (a

course of action which had no valid legal basis whatsoever), (4) accepting rent from the airport tenant at a time when NPL was the record owner and frustrating NPL's efforts to collect rent from the tenant; and (5) manipulating public opinion through dissemination of damaging accusations about NPL's owners to support their rezoning efforts and to thwart NPL's attempt to use its own property.

The County stepped well beyond its typical role in the zoning of private property because its "zoning" and other actions were, transparently, as the County itself admitted in briefing below, a self-interested effort to obtain an additional public airport for the County without having to pay for it. If there were ever a case where application of the "continuing wrong" doctrine to toll the accrual of the statute of limitations is appropriate, it is this case.

Given that all parties are thus in agreement that the County's "continuing wrongs" would have tolled the statute in the absence of the 1982 transfers of title, there is no basis for cutting off the application of that doctrine simply because of the paper transfers. *NPL* (not its transferees) remained the opposing party in the County's lawsuits (the title or constructive trust case, and the unjust enrichment and eviction lawsuits as well) and its owners were the target of the County's efforts to appropriate the property. NPL, under the language of the warranty deeds, possessed the legal duty to its transferees to defend a title challenge such as the County's. Thus, there is nothing in the transfers of title which would logically terminate application of the "continuing wrong" tolling

principles. For this additional reason, the result reached by the Eleventh Circuit was clearly correct.

Additional reasons why the statute of limitations never expired on NPL's claims are found in the doctrines of equitable tolling under state law and abstention. Assuming NPL, which was all but bankrupted by the vast array of litigation against the County over the property, could afford yet another lawsuit, no federal court would have entertained it during the pendency of the state law challenge, based upon *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). For instance, a federal court would avoid any possible inconsistency between its own Judgment and those of state courts regarding whether the County or NPL was entitled to title ownership and whether the airport zoning was confiscatory. In those circumstances, plainly the statute of limitations of the federal claims cannot run.

Moreover, under Florida law, whose principles of tolling also apply under *Board of Regents of State University of New York, v. Tomanio*, 446 U.S. 478 (1980), "during the pendency of litigation provoked by defendant's own acts, limitations do not run against plaintiff." *Davis v. Combination Awning & Shelter Co.*, 62 So.2d 742, 744 (Fla. 1955). Florida law also requires tolling to prevent a defendant from profiting by its own wrong. *Machules v. Dept. of Administration*, 523 So.2d 1132 (Fla. 1988); *State ex rel. Hollywood Jockey Club v. Stein*, 183 So.2d 753 (1938).

NPL also argued, in a position noted but not addressed by the Eleventh Circuit below, *see* 985 F.2d 1494 n.13, that the seven-year limitations period of § 95.12, Fla.Stat. (real property actions) or some longer period

applied. *See, Marshall v. Kleppe*, 637 F.2d 1217 (9th Cir. 1980); *contra, Bieneman v. City of Chicago*, 864 F.2d 463, 467-70 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989). NPL would also contend that any reduction in the pertinent limitations period should not be retroactively applied. Under a seven year or longer limitations period, NPL's claims arising directly under the Constitution would be timely.

For any of these reasons, NPL's claim was timely brought in 1987. While the facts of the case are unusual and (one hopes) unlikely to recur, the result reached by the Eleventh Circuit was proper on any number of legal grounds.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX 1

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR MONROE COUNTY, CIVIL ACTION

MONROE COUNTY, a political subdivision, State of Florida, Plaintiff, vs. NEW PORT LARGO, INC., a Florida corporation, Defendant,	CASE NO. 82-432-CA-17 FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL JUDGMENT

THIS COURT, after having heard the evidence and considered the weight to be given the testimony of each witness in the light of their demeanor while testifying, their frankness or lack thereof, their interest in the outcome of the case if any, their means and opportunity to know the facts about which they testified, the reasonableness of their testimony in light of all of the evidence in the case, and considering the Citations of authority and argument of counsel for the parties, makes the following findings of fact, conclusions of law and enters the following Final Judgment:

I. FINDINGS OF FACT.

1. In 1960, Darryle Sheley ("Sheley") acquired certain property referred to as the Port Largo Subdivision

("Subdivision") as trustee for Mr. and Mrs. Stuart Faber ("Faber").

2. In the early 1960s, Sheley began developing the Subdivision.

3. In the course of said development, he dug two canals which provided deep-water access to the Subdivision.

4. Sheley allowed the Monroe County ("County") mosquito control planes to use a portion of his land in the Subdivision, that had been cleared but not yet developed as an air-strip.

5. As the Subdivision developed with houses and electric and phone equipment, the airplanes could not use the Subdivision as an airstrip.

6. In 1967, Sheley and his friend, County Commissioner Harry Harris ("Harris"), began to discuss the possibility of acquiring certain submerged property adjacent to the Subdivision (the "Property") from the Trustees of the Internal Improvement Fund ("Trustees") to construct an airstrip so that the Monroe County ("County") mosquito control planes could have an Upper Keys landing site.

7. Sheley and Harris tentatively agreed that if Sheley, the abutting upland owner of the "Property", acquired the Property he would at some future date donate it to the County in consideration for the County's construction of a breakwater and north-south canal for the Subdivision. The breakwater and canal were to be built on some submerged land owned by Sheley and the "Property" to be obtained from the "Trustees".

8. In accordance with this plan, Sheley, through Jim Glass ("Glass") who also served as Monroe County Engineer, applied to the Trustees for title to the Property.

9. Jim Glass had no authority to encumber or convey the Property on behalf of Sheley.

10. After several delays by the "Trustees", and several revisions of the application, including revision of the bulkhead line so that it would not extend beyond the rights of the adjacent property owners and revising the price per acre from $300.00 to $414.15. The Trustees sold the "Property" to Sheley by Deed which contained no restrictions or reservations as to the Properties use.

11. The County learned through its consultant, that it could not obtain funds for the breakwater and canal, and the County abandoned the plan.

12. The County communicated its abandonment of the plan to Sheley, through Harold Wilde ("Wilde"), its airport consultant.

13. Sheley, under his plan with the County, intended to construct a 100-foot-wide airstrip; however, after the County abandoned the plan, Sheley spent more than $400,000.00 to construct a 150-foot-wide breakwater, which included a row of residential lots and a street.

14. Sheley paved the street which has become used as the landing strip.

15. In 1970, Sheley's trust expired and Kenneth Bassett ("Bassett") became trustee.

16. Sheley continued to develop and manage the Property under a power of attorney from Bassett.

17. In 1972, the County, pursuant to Sheley's request, platted the Property into residential lots and zoned the Property for residential duplexes.

18. Also in connection with the platting, the County accepted Sheley's deed to certain lots which they now claim, as a bond to assure completion of Subdivision improvements.

19. Upon completion of the Subdivision improvements, the County returned the deed to the lots to Sheley without making any demands for dedication of the Property to the County as an airstrip.

20. The County has collected taxes and levied solid waste assessments on the Property as residential lots and not as an airstrip.

21. New Port Largo, Inc., a Florida corporation ("New Port Largo"), acquired the Property from Bassett in September, 1979.

22. Although Charles Netter ("Netter"), an attorney, one of the principals of New Port Largo, was advised that the County had a claim against the Property, he checked the title to the Property, including the abstract, the Trustees deed, the platting, the taxes and assessments and the zoning and determined that title was vested in Bassett.

23. Stuart Marr ("Marr"), who is now the other principal of New Port Largo, acquired an interest in the corporation some time after the original contract for purchase of the Property and before the closing.

24. Marr had, more than a year prior to becoming a principal in New Port Largo, been involved as the broker

on behalf of Mr. and Mrs. Joseph L. Sharit in the sale of their Subdivision lot to Mr. and Mrs. Gerald Recob.

25. During the course of that closing, Marr had heard about the County's claim; however, he had not studied Sharit's documents and did not know of the substance or details of the claim.

26. New Port Largo paid valuable consideration, to-wit, more than Two Million Dollars ($2,000,000.00) for the Property.

II. CONCLUSION OF LAW

1. The County has failed to establish an express trust for the Property.

2. As with any contract, for a promise to donate land in the future to be binding, there must be some legal consideration passed. The Third DCA addressed this issue in *Kaufman v. Harder*, 354 So. 2d 109 (3d DCA, 1978). That case stands for the proposition that there can be no indebtedness without legal consideration; and that a mere gratuitous promise of a future gift, lacking consideration, is unenforceable as a nudum pactum.

The consideration needed to make such an agreement binding would be either some benefit to the promisor/landowner or a detriment to the promisee/county. In the case at bar, the landowner has received no benefit as a result of his alleged promise to the county, because he bought the land from a Third Party, the State, in a transaction that is separate from his alleged promise to the County. Neither has there been a detriment to the promisee/County, because they have not paid any money or

any other consideration in return for the alleged promise. Thus, applied to the *Kaufman* case, consideration is lacking, and the landowner's gratuitous promise can not be enforced.

Failure to carry out a promise cannot in itself give rise to a constructive trust. Consideration must be passed between the parties for such a trust to be found. *Leeper v. Gorman,* 128 So. 876 (Fla. 1930). As seems to be established by the facts of the present case, the landowner received no consideration in exchange for his alleged promise.

More recently, the 3rd DCA, in *Yawn v. Blackwell,* 343 So.2d 906 (3rd DCA, 1977) found that for a constructive trust to be imposed there must exist a situation between parties involving fraud, undue influence, abuse of confidence or mistake. To enforce a constructive trust in the case at bar, under the requisites of *Yawn,* the Court would have to find that a fraudulent representation by the landowner to the County was the actual cause of the State's sale of the land to said landowner. Such does not appear to be the case, as the sale by the State was not conditioned by any such future donation of land to the County.

When weighing the evidence of the existence of consideration, or of any fraud or mistake to prove constructive trusts, the standard as set by the 3rd DCA is that of "clear and convincing" evidence. *Hiestand v. Geier,* 396 So. 2d 744 (3DCA, 1981).

3. The County has failed to establish fraud, breach of fiduciary duty or any other inequity by Sheley or his successors.

4. The County has failed to prove that any enforceable contract to convey the Property existed between Sheley and the County for the Property.

5. The County has failed to establish the basis for imposition of a constructive trust.

6. Even if the County had produced clear and convincing evidence sufficient to establish a constructive trust, and it has not, the County, by platting, accepting and returning deeds, taxing and assessing the Property is equitably estopped to claim the Property from New Port Largo.

7. The County, which is a political subdivision of the State of Florida, is legally estopped to claim any right in the Property or any limitation on the use of the Property because it is bound by the unrestricted deed from the Trustees to Sheley.

8. The County, which delayed almost 14 years to assert a claim to the Property, is barred from relief under the doctrine of laches.

9. New Port Largo is a bona fide purchaser for value of the Property.

10. Since the rights of an innocent third party bona fide purchaser for value have intervened, the County cannot divest New Port Largo of title to the Property.

IT IS THEREUPON ORDERED AND ADJUDGED AS FOLLOWS:

1. The final judgment is in favor of Defendant, NEW PORT LARGO, INC., and against the Plaintiff,

MONROE COUNTY, a political subdivision of the State of Florida.

2. The County shall take nothing by this action and shall go forth hence without day.

3. The Court reserves jurisdiction to tax costs on behalf of New Port Largo and against Monroe County.

DONE AND ORDERED in Chambers, at Monroe County, State of Florida this 27 day of March, 1984.

/s/ Francis X. Knuck
FRANCIS X. KNUCK,
Circuit Judge

Copies to:

Walter S. Kyle, Esq.
Lucien C. Proby, Jr., Esq.
Joseph B. Allen, III, Esq.
Charles Netter, Esq.
Joe Creely, Esq.
Joe Sharit, Jr., Esq.
Mallory H. Horton, Esq.
Marsha G. Rydberg, Esq.

APPENDIX 2

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR MONROE COUNTY, CIVIL ACTION

NEW PORT LARGO, INC. A Florida Corporation, Plaintiff, vs. DON SCHLOSSER, CURTIS BLAIR GERALD HERNANDEZ, JR., RICHARD KERR, and GEROGE DOLEZAL as the Board of Commissioners of Monroe County, Florida, and MONROE COUNTY, FLORIDA, a political subdivision of the State of Florida, Defendants.	)	CASE NO. 80-1164-CA-17

FINAL SUMMARY JUDGMENT

This cause came on to be heard on the Motion for Summary Judgment of plaintiff, and the court hearing considered the argument of counsel for the respective parties and the evidence of record, finds as follows:

1. This Court has jurisdiction over the parties and the subject matter of this action.

2. The subject property compris[es] more than five acres and the rezoning application is therefore a major development and subject to the procedures of the Major Development Project Ordinance (Chapter 6, Article VII, Monroe County Ordinances).

3. Ordinance No. 14-1979, enacted by defendant, Monroe County, on June 5, 1979, establishes a zoning district

classification of private airport defining same in accordance with the definition of private airport in Chapter 333.01, Florida Administrative Code. The only permitted use in said zoning district is a private airport.

4. The airport located on the subject property, operated by a lessee, was a public airport. The subject property does not qualify by dimensions to meet the requirements as a public airport or a private airport.

5. Monroe County did not comply with the requirements of the Major Development Product Ordinance in the rezoning.

6. During the year 1982 Monroe County filed suit to establish ownership of the subject property, Case No. 82-432-CA-17, Monroe County Circuit Court. In 1984, the Circuit Court denied the claim of the County, declaring the property to be owned by plaintiff. The decision was affirmed in Monroe County v. New Port Largo, Inc., 467 So.2d 757 (Fla. 3d DCA 1985). This rezoning of this property, now determined to be private, to airport, would deprive the owner of any reasonable use. However, the Court finds that the county attempted the rezoning in good faith inasmuch as it had an arguable claim at the time of filing the application for rezoning.

Therefore, it is Ordered and Adjudged as follows:

A. The attempted rezoning of the subject property to Private Airport is invalid and Resolution No. 234-1980 is hereby quashed and said resolution is declared to be of no force and effect.

B. That final summary judgment is hereby entered in favor of plaintiff.

C. Costs of this action shall be taxed at a subsequent hearing.

DONE AND ORD[E]RED in Chambers, Monroe County Courthouse, Key West, Florida, this 2nd day of January, 1986.

/s/ M. Ignatius Lester
Circuit Judge

Conformed Copies Furnished To:

JOSEPH B. ALLEN, III, ESQ.
LUCIAN C. PROBY, Jr., ESQ.

COPIES OF THE ABOVE FINAL SUMMARY JUDGMENT WERE HANDED OR MAILED TO ATTORNEYS OF RECORD

ON 1/2/86

BY /s/ E. Gato

APPENDIX 3

ASSIGNMENT

Stuart D. Marr, and Charles H. Netter, individually and TFW, Inc. and First National Bank of South Miami, as Trustee for Marr Land Trust 741 ("Assignors") and each of them, do hereby irrevocably assign to New Port Largo, Inc., a Florida corporation ("Assignee"), any and all claims, demands, and causes of action, if any, which each has or may have against Monroe County, a political subdivision of the State of Florida, arising out of or on account of the activities of Monroe County as alleged in Case No. 87-10043-CIV-KING, entitled *New Port Largo, Inc. v. Monroe County.*

Assignors each ratify commencement and prosecution of the action by New Port Largo, Inc. Assignors acknowledge that each is abandoning dominion and control over all rights assigned, but that, nonetheless, each will be bound, by res judicata and otherwise, by the results of the lawsuit obtained, whether at trial or by settlement, by New Port Largo, Inc., without prejudice to any rights to appeal.

Assignee for its part accepts the assignments and agrees to prosecute the action diligently and to assert all claims arising out of the pending complaint in the above-cited lawsuit, whether the claim was originally the claim of it or any assignor.

All parties agree that any net proceeds of the lawsuit shall be divided between the shareholders of assignee in the proportion of his ownership of assignee.

ASSIGNORS:

/s/ Stuart D. Marr,
Stuart D. Marr,
Individually

Before me appeared Stuart D. Marr, known to me to be the above individual who signed the above in my presence on this 24th day of July, 1989.

/s/ Illegible
Notary Public

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. OCT. 5, 1990
BONDED THRU GENERAL INS. UND.

FIRST NATIONAL BANK OF
SOUTH MIAMI, as Trustee for
MARR LAND TRUST LT #741

By: /s/ John J. Murphy
JOHN J. MURPHY
VICE PRESIDENT
SR. TRUST OFFICER
as Trustee

Before me appeared John J. Murphy, known to me to be the above individual, who signed the above in my presence in the noted capacity, on this 24th day of July 1989, 1989.

/s/ Illegible
Notary Public

My Commission Expires
NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. JAN 25, 1992
BONDED THRU GENERAL INS. UND.

TFW, INC.

By: /s/ Charles H. Netter,
Charles H. Netter,
Individually

BY: /s/ Charles H. Netter
Charles H. Netter, as
as President of T.F.W.,
Inc., a Florida corporation

Before me appeared Charles H. Netter, known to me to be the above individual, who signed the above in my presence in the noted capacity on this 24th day of July, 1989.

/s/ Illegible
Notary Public

My Commission Expires
NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. OCT. 5, 1990
BONDED THRU GENERAL INS. UND.

ASSIGNEE:

NEW PORT LARGO, INC.

BY: /s/ Stuart D. Marr
Stuart D. Marr,
President

BY: /s/ Charles H. Netter
Charles H. Netter,
Secretary Treasurer

Before me appeared Charles H. Netter and Stuart Marr known to me to be the above individuals, who

signed the above in my presence in the noted capacities, on this 24th day of July, 1989.

/s/ Illegible
Notary Public

My Commission Expires:
NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. OCT. 9, 1990
BONDED THRU GENERAL INS. UND.